

NOTICE

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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JAMES D. HARMON,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11206
Trial Court No. 1JU-09-708 CI

MEMORANDUM OPINION

No. 6268 — January 13, 2016

Appeal from the Superior Court, First Judicial District, Juneau,
Trevor N. Stephens, Judge.

Appearances: Brooke V. Berens, Assistant Public Advocate,
Appeals and Statewide Defense Section, and Richard Allen,
Public Advocate, Anchorage, for the Appellant. Tamara E.
de Lucia, Assistant Attorney General, Office of Special
Prosecutions and Appeals, Anchorage, and Michael C.
Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Coats, Senior Judge,* and
Hanley, District Court Judge.**

Judge MANNHEIMER.

* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

** Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

James D. Harmon filed a petition for post-conviction relief, alleging that he received ineffective assistance from the legal counsel who represented him at his trial. This *pro se* petition was later supplemented by an amended petition filed by Harmon's post-conviction relief attorney. However, in this amended pleading, the post-conviction relief attorney told the court that none of Harmon's claims had merit.

With regard to the claims of ineffective assistance of counsel that Harmon presented in his earlier *pro se* petition, Harmon's post-conviction relief attorney tried to get Harmon's two trial attorneys to submit affidavits addressing Harmon's claims, but the two attorneys refused. Following this refusal, Harmon's post-conviction relief attorney asked the superior court to hold an evidentiary hearing (apparently, so that Harmon's trial attorneys could be made to answer his claims), but the post-conviction relief attorney did nothing more to help Harmon develop factual support for his claims of ineffective assistance.

The superior court dismissed Harmon's petition for failing to state a *prima facie* case for relief. We reverse the superior court's decision for two reasons. First, the post-conviction relief attorney's "no arguable merit" certificate was legally deficient, in that it failed to adequately explain *why* the attorney concluded that Harmon had no arguable basis for seeking post-conviction relief. Second, given the fact that Harmon's trial attorneys declined to respond to his claims of ineffective assistance, the superior court should have taken steps to assist Harmon in developing a factual underpinning for his claims — steps such as granting the evidentiary hearing Harmon requested, or ordering the trial attorneys to file affidavits responding to Harmon's claims, or directing Harmon's post-conviction relief attorney to investigate the underlying facts and present them in a supplemental pleading.

Underlying facts

In 2003, James D. Harmon was convicted of second-degree murder, first-degree sexual assault, second-degree theft, and attempted first-degree sexual assault. This Court upheld Harmon’s convictions on direct appeal: *Harmon v. State*, 193 P.3d 1184 (Alaska App. 2008).

In 2009, following this Court’s affirmance of Harmon’s convictions, Harmon filed a *pro se* application for post-conviction relief in which he argued that his two trial attorneys, David Seid and Julie Willoughby of the Public Defender Agency, provided ineffective assistance of counsel.

In particular, Harmon asserted that his trial attorneys “failed to inform [him] about certain [false] claims by the state”, that his attorneys were “unprepared for court on more than one occasion”, and that they failed to inform him that he needed to stand up when the jury entered the courtroom. Harmon also accused his attorneys of being unenthusiastic about representing him. Harmon alleged that he was present on one occasion when Seid jokingly asked another attorney to “take this case off his hands”. Harmon claimed that another example of Seid’s “indifference” was Seid’s failure to object when the court allowed a juror to leave the jury in the middle of trial.

The superior court appointed Michael R. Smith (under contract with the Office of Public Advocacy) to represent Harmon in the post-conviction relief action. Smith ultimately filed an amended application on Harmon’s behalf in May 2011 — but, at the same time, Smith declared that all of the claims for relief listed in this amended application were frivolous.

Part A of this amended application appeared to be a typical attorney’s amendment of a *pro se* application. Smith described the procedural history of Harmon’s case, and he asked the superior court to hold an evidentiary hearing so that Harmon

could present and/or cross-examine witnesses, “including ... an expert witness to testify regarding whether [Harmon’s] trial counsel met the minimum standard of professional conduct for a criminal defense attorney.”

But in Part B of this same application, Smith declared that he had reviewed Harmon’s case and that he did not believe that Harmon could succeed on his ineffective assistance of counsel claim. Smith alerted the superior court that Harmon’s view of the matter “differ[ed]” from Smith’s own opinion, and Smith told the court that, because of this difference of opinion, he had decided to include an affidavit from Harmon in which Harmon listed his various assertions of ineffective assistance.¹

Smith actually attached two affidavits to his amended application for post-conviction relief: Harmon’s affidavit, and Smith’s own affidavit. Smith’s affidavit described the actions he took to investigate Harmon’s post-conviction relief case.

¹ Harmon’s affidavit listed the following perceived errors of his trial counsel:

1. They were not prepared for court;
2. They failed to instruct Harmon to stand when the jury came in and out of the courtroom;
3. They failed to object to the removal of a juror prior to deliberations;
4. They failed to investigate or pursue a claim that the prosecutor improperly pressured the jury to convict Harmon;
5. They failed to argue that, because the jury left the verdict form for first-degree murder unsigned, the jury could not legally find Harmon guilty of the lesser offense of second-degree murder; and
6. They failed to argue that, under this Court’s decision in *Linehan v. State*, 224 P.3d 126 (Alaska App. 2010), circumstantial evidence is legally insufficient to support a conviction for murder.

In addition, Harmon argued that Seid was incompetent because he pursued a motion for a change of venue even though Harmon asked him not to. (The trial judge denied this motion for a change of venue, and we upheld the trial judge’s decision on appeal. *Harmon*, 193 P.3d at 1200.)

According to Smith's affidavit, he spoke with Harmon about the case and he thoroughly reviewed Harmon's file (*i.e.*, the file kept by Harmon's defense attorneys), including "pleadings, discovery, evidence, transcripts[,] and audio recordings".

Smith also spoke with Harmon's trial attorneys, Seid and Willoughby. According to Smith, he asked Seid and Willoughby whether Harmon might have pursued an alibi defense, but both Seid and Willoughby told Smith that Harmon had no viable alibi defense. According to Smith's affidavit, he also asked Seid and Willoughby whether they had investigated potential exculpatory evidence. According to Smith, the two attorneys reported that their attempts to discover exculpatory evidence "[were] not always fruitful or fit for presentation at trial".

Smith also declared that he had reviewed the autopsy reports, the police reports, and the witness testimony at Harmon's trial "in an effort to find something that was overlooked or not properly pursued". Smith stated that he did not find anything "helpful" to Harmon's case in these records. Rather, according to Smith, his review of Harmon's case revealed that "the State presented considerable evidence at [Harmon's] trial" and that, in light of this evidence, it would be difficult to prove that "attorney[] incompetence contributed to the verdict".

Toward the end of his affidavit, Smith listed Harmon's claims (the same claims described in Harmon's affidavit). Smith did not elaborate on any of these claims, nor did he offer any individualized analysis of these claims. Rather, he simply told the superior court that, "[based on his] review of the case file, [the] discovery, [the] evidence[,] and discussions with the named individuals and witnesses connected with ... Harmon's case, [he] could not find errors so significant as to require reversal [of Harmon's convictions]".

In May 2011, after the superior court received these pleadings from Smith, the superior court issued a notice to the parties. In this notice, the court acknowledged

that Smith had declared that Harmon did not have any viable claims for post-conviction relief. Nevertheless, the superior court declared that it was not going to dismiss Harmon's case.

The superior court concluded that Rule 35.1(f)(2) did not apply to Harmon's case because of the "hybrid" nature of Harmon's application (*i.e.*, the fact that Smith had presented Harmon's *pro se* claims for relief separately), and also because the court believed that at least two of Harmon's *pro se* claims potentially had merit.

The superior court therefore told the parties that Harmon's case would go forward based on Harmon's *pro se* petition for relief. The court directed the State to respond to Harmon's *pro se* petition, and the court allowed Smith to continue representing Harmon.

The State responded to the superior court's order by filing a motion to dismiss all of Harmon's claims for failure to state a *prima facie* case for relief. Smith filed an opposition to the State's motion. In his opposition, Smith now asserted, contrary to his earlier certificate of "no arguable merit", that Harmon's petition *did* present a *prima facie* case for relief — although Smith did not explain why he thought this. Smith asked the superior court to schedule an evidentiary hearing on Harmon's claims, and he also announced that Harmon intended to depose his trial attorneys and one or more of the jurors in his case.

About a week later, Smith asked the superior court to schedule a representation hearing. Smith told the court that Harmon wanted to represent himself, or at least to establish a judicial record of his difficulties with Smith. Pursuant to this request, the superior court held a representation hearing in November. At the conclusion of this hearing, Harmon decided to proceed as "co-counsel" with Smith.

The following month (December 2011), Smith filed a supplemental opposition to the State's motion to dismiss Harmon's petition for post-conviction relief.

In this supplemental pleading, Smith reiterated Harmon's request for an evidentiary hearing. Smith told the court that Harmon had asked Seid and Willoughby to provide affidavits responding to his claims of ineffective assistance, but the two attorneys had not provided any affidavits. Smith also told the court that Harmon wished to question the members of his jury as to why they failed to reach a verdict on the charge of first-degree murder.

No evidentiary hearing was ever held. Instead, in February 2012, the superior court issued an order dismissing Harmon's petition for post-conviction relief. The court ruled that Harmon had failed to present a *prima facie* case for relief with regard to any of the twelve claims listed in his *pro se* petition.

The superior court apparently accepted the truth of Smith's assertion that (1) he had asked Seid and Willoughby to submit affidavits responding to Harmon's claims of ineffective assistance of counsel, and (2) the two attorneys had refused. Nevertheless, the court concluded that none of Harmon's various attacks on his attorneys' performance was supported by sufficient factual detail to survive a motion for judgement on the pleadings.

Why we reverse the superior court's decision

We reverse the superior court's decision for two reasons.

First, Harmon's post-conviction relief attorney filed a pleading in which he declared that Harmon had no meritorious claims for post-conviction relief, but this pleading failed to provide the superior court with sufficient facts to allow the superior court to independently evaluate whether the attorney had zealously investigated Harmon's case.

As this Court explained in *Griffin v. State*, 18 P.3d 71, 76-77 (Alaska App. 2001), independent judicial review of an attorney’s certificate of “no arguable merit” is a critical aspect of protecting an indigent defendant’s right to effective assistance of counsel. The court has a constitutional duty to make sure that indigent petitioners receive zealous and competent representation in their post-conviction relief litigation.² To enable the court to perform this duty of independent review, an attorney’s certificate of no arguable merit must provide “a full explanation of all the claims the attorney has considered and why the attorney has concluded that these claims are frivolous.” *Griffin*, 18 P.3d at 77. (This requirement is now codified in Criminal Rule 35.1(e)(3).)

The no-merit certificate filed by Smith was plainly deficient on this score.

Criminal Rule 35.1(e)(3) states that an attorney’s “no arguable merit” certificate must contain a “full description” of the claims the attorney considered, the materials the attorney reviewed, the investigations the attorney conducted, and the reasons why the attorney concluded that the defendant had no claim of any arguable merit.

Smith’s certificate described the materials he had reviewed and the people he had talked to about Harmon’s case. Smith also described the claims Harmon wanted to raise, as well as a few claims that Smith considered on his own: a potential alibi defense; inconsistencies in the autopsy reports, police reports, and witness testimony; potential problems with the jury instructions; and issues involving Harmon’s right to testify. But Smith’s certificate did not provide a detailed explanation of the *reasons* why Smith concluded that none of these potential claims had any arguable merit. Smith simply asserted that, “[b]ased on [his] review of the case file, discovery, evidence[,] and

² *Tazruk v. State*, 67 P.3d 687, 691 (Alaska App. 2003).

discussions with the named individuals and witnesses connected with ... Harmon's case, [he] could not find [any] errors so significant as to require reversal of [Harmon's] conviction."

This analysis was insufficient for a reviewing court to independently determine that Harmon had no non-frivolous claims for relief.

Even more problematic is the fact that Smith's pleading suggests that he applied the wrong legal standard when he evaluated Harmon's potential claims.

In *Griffin*, this Court drew a distinction between claims that have "no merit" and claims that are "frivolous". While a defendant's claims might have no merit "in the sense that [a] ... court [would] likely rule against [them]", this Court concluded that an attorney appointed to represent an indigent defendant can be allowed to withdraw only if the attorney shows that all of the defendant's potential claims are *frivolous*—meaning that "no reasonable argument [could] be made in [their] favor." *Id.* at 73.³

Smith's affidavit clearly states that he did not think Harmon's claims had merit. But it is not clear from Smith's affidavit whether he meant that he thought Harmon's claims would ultimately be unsuccessful when they were litigated, or whether Smith meant that he thought Harmon's claims were *frivolous*.

Indeed, Smith's pleadings strongly suggest that he was saying the former, and not the latter—for in Smith's second affidavit, he told the superior court that a few of Harmon's claims had "*some merit*". (Emphasis added.) If Smith believed that one or more of Harmon's claims had some arguable merit, then he should not have filed a "no arguable merit" certificate, and the superior court should not have allowed Smith to cease his efforts on behalf of Harmon.

³ Citing *Smith v. Robbins*, 528 U.S. 259, 279-81; 120 S.Ct. 746, 761-62; 145 L.Ed.2d 756 (2000).

But based on Smith’s certificate of no merit, the superior court ruled that Harmon’s case should go forward solely on the claims listed in Harmon’s earlier *pro se* application for post-conviction relief. In other words, the court relieved Smith of the duty to investigate and present any other potential claims. This was a violation of Harmon’s right to zealous representation in the post-conviction relief litigation.

Our second reason for reversing the superior court’s decision is that Harmon never received a proper opportunity to develop his claims of ineffective assistance of counsel against his trial attorneys.

As we explained above, Harmon made various claims of ineffective assistance of counsel in his *pro se* application for post-conviction relief. And when the superior court conducted its preliminary evaluation of Harmon’s application, the court concluded “that certain of [Harmon’s] allegations ... [could] provide a colorable claim [for relief]”, although the claims as framed in Harmon’s *pro se* pleading were presented “in a conclusory manner with no details”.

Moreover, the superior court apparently accepted the truth of Smith’s assertion that (1) he asked Seid and Willoughby to submit affidavits responding to Harmon’s claims of ineffective assistance of counsel, and (2) the two attorneys refused.

Nevertheless, the superior court ultimately dismissed all of Harmon’s claims of ineffective assistance of counsel because the court concluded that none of them was supported by sufficient factual detail.

Although this Court’s past opinions have focused more on the attorney’s duty to provide a sufficiently detailed no-merit certificate, we have also emphasized the superior court’s independent duty to ensure that there is a sufficient record to allow the court to independently assess whether the post-conviction relief attorney has zealously pursued the defendant’s case. *See Tazruk v. State*, 67 P.3d 687, 691 (Alaska App. 2003); *Griffin*, 18 P.3d at 76-77.

Here, Harmon's trial attorneys declined to respond to his claims of ineffective assistance. Harmon's post-conviction attorney, Smith, asked the superior court to hold an evidentiary hearing — but having made this request, Smith apparently engaged in no further efforts to develop the facts to support Harmon's claims. Nor did Smith help Harmon re-draft these claims so that they contained sufficient factual detail to survive a motion to dismiss.

Given this situation, the superior court should not have dismissed Harmon's ineffective assistance of counsel claims without giving Harmon a better opportunity to develop a factual underpinning for these claims. For instance, the court might have held the evidentiary hearing that Smith requested, directing Harmon's trial attorneys to attend and testify. Or the court might have ordered the trial attorneys to attend a deposition. Additionally, the court might have directed Smith to help Harmon flesh out the factual details of his claims, so that he would have an attorney's assistance in redrafting these claims to survive a motion for judgement on the pleadings.

Instead, Harmon was essentially left to his own devices — forced to draft his claims and litigate them without the assistance of counsel, and without the benefit of court process to obtain additional evidence to support these claims.

Conclusion

For the reasons explained here, we VACATE the judgement of the superior court, and we remand Harmon's case to that court for further proceedings on Harmon's petition for post-conviction relief.